In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1392

LOUIS BOYCE AND FRANCISCO SOLIMENE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were entitled to receive certain notes made by the prosecutor to serve as a guide in interrogating a government witness at trial, which they contend constituted a "statement" within the meaning of 18 U.S.C. 3500(e).

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of having conspired to smuggle into the United States and to possess with intent to distribute 155 pounds of heroin in violation of 21 U.S.C. 846. They were sentenced to fifteen years' imprisonment. The court of appeals affirmed (Pet. App. A1-A2).

1. Evidence at trial established that petitioners, co-defendants Averso and Bonetti, government witness Americo Altamirano, and others participated in a major

conspiracy to smuggle large quantities of heroin into the United States from South America. Specifically, the evidence showed that the conspiracy consisted of two groups, of which petitioners and Averso were the architects of the "receiver" group, which purchased heroin directly from the "supplier" group, which was headed by Bonetti and was based in South America. On July 8, 1971, co-conspirator Rafael Richard was arrested at Kennedy Airport in possession of 155 pounds of heroin, destined for the "receiver" group, as Richard tried to enter the United States from Panama with a diplomatic passport (R. 142-178).

2. After Altamirano, the chief government witness at petitioners' trial, testified on direct examination, the prosecutor proferred to defense counsel a copy of Altamirano's grand jury testimony. At that time he advised defense counsel that there were no other Altamirano statements to which defendants were entitled under the Jencks Act, 18 U.S.C. 3500. (R. 350.) Thereafter, the prosecutor was asked by the court whether he had taken any notes during his interviews of Altamirano. The prosecutor replied that he might have taken "occasional jottings at several of the interviews" and that from these jottings he had prepared a series of questions which he asked Altamirano before the grand jury (R. 364, 374). The prosecutor further explained that he discarded the jottings and grand jury questions and prepared 12 pages of trial notes, which he had used at trial in questioning Altamirano (R. 366, 374). These trial notes, consisting of 198 questions and 47 *expected* answers (See Pet. App. A3-A13), were submitted to the court for an *in camera* examination. During the *in camera* examination, the court asked the prosecutor whether the notes were ever read back to Altamirano for his adoption or approval and the prosecutor answered

"no" (R. 366). Subsequently, the court ruled that the notes did not qualify as a "statement" under 18 U.S.C. 3500 (R. 375-376).

3. Petitioners contend that the court's failure to furnish defense counsel with the prosecutor's trial notes violated the provisions of 18 U.S.C. 3500. However, these notes, prepared by the prosecutor as a guide in questioning Altamirano at trial, clearly do not constitute a "statement" of a witness as defined in 18 U.S.C. 3500(e). See *Campbell* v. *United States*, 373 U.S. 487; *Palermo* v. *United States*, 360 U.S. 343; *United States* v. *Goldenstein*, 456 F. 2d 1006 (C.A. 8); *United States* v. *Myerson*, 368 F. 2d 393 (C.A. 2), certiorari denied, 386 U.S. 991; *United States* v. *Aviles*, 337 F. 2d 552 (C.A. 2), certiorari denied, 380 U.S. 906. The notes were not statements "adopted or approved" by Altamirano (18 U.S.C. 3500(e)(1)), nor "substantially verbatim" recitals of Altamirano's oral statements made "contemporaneously" to such statements (18 U.S.C. 3500(e)(2)), nor a statement made by Altamirano to the grand jury (18 U.S.C. 3500(e)(3)). As noted by the United States Court of Appeals for the Second Circuit, "courts * * * must also be meticulous in satisfying themselves that what is made available truly represents the witness' own statements." *United States* v. *Aviles*, *supra*, 337 F. 2d at 559.

Moreover, the fact that the trial court did not notice that the notes contained expected answers, is irrelevant to a determination of whether or not these notes constituted a witness' "statement" under 18 U.S.C. 3500 since there is no showing that these answers were approved or adopted by the witness.[1]

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[1] In any event, the minor variations between the answers expected and those actually given upon which petitioners rely (Pet. 18-23) were not significant, and reflected primarily the brevity of the notes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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